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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 377

EASTERN SUGAR ASSOCIATES (a Trust),
Petitioner,

v.

JOSE A. PEÑA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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JOSE A. PEÑA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable, The Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decision and judgment of the United States Circuit Court of Appeals for the First Circuit entered in the above case on May 25, 1955.

Opinions Below

The opinion of the Circuit Court of Appeals for the First Circuit, handed down on May 25, 1955 (Record on Appeal, pp. A91-A98) * is reported in 222 F. 2d 934. It is also reproduced in the Appendix to this Petition starting at page 24, *infra*.

* References are to the Record on Appeal in the First Circuit Court of Appeals, as supplemented with the proceedings in the said Court.

The opinion of the Supreme Court of Puerto Rico handed down on March 15, 1954 (R. on A., pp. A59-A69) and appealed to the Court of Appeals for the First Circuit, is not as yet officially reported.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit which is sought to be reviewed herein was entered on May 25, 1955 (R. on A., p. A99). Petitioners applied for and obtained a retention of the mandate on June 23, 1955 and filed a petition for rehearing on July 7, 1955 (R. on A., p. A107). Rehearing was denied on August 3, 1955. Upon application of petitioners, the Circuit Court of Appeals on August 10, 1955 ordered a stay of the mandate until September 12, 1955 for the filing of the petition herein. (R. on A., p. A107.)

The jurisdiction of this Court is invoked under 28 U.S.C. 1245(1).

Questions Presented

1. Whether the United States Court of Appeals for the First Circuit can decline to decide the federal question on which an appeal from a decision of the Supreme Court of Puerto Rico is taken, and can dispose of the appeal by considering and deciding questions of Puerto Rican local law not theretofore decided, and expressly left open for adjudication by the Supreme Court of Puerto Rico and not assigned on appeal.

2. Whether the statute of limitations provision of Section 6 of the Portal-to-Portal Act (29 U.S.C., Section 255) is substantive in nature, extinguishes the cause of action and can be raised for the first time on appeal.

3. Whether the States or Puerto Rico have unrestricted

authority under the provisions of Section 18 of the Fair Labor Standards Act (29 U.S.C., Section 218) to enact "more favorable" legislation, even though contrary to the provisions of the Fair Labor Standards Act and/or the Portal-to-Portal Act and to the intent of Congress thereunder.

4. Whether the statute of limitations provision of the Portal-to-Portal Act applies to claims for wages in interstate commerce purportedly arising under local laws.

Statutes Involved

The statutes involved, or pertinent portions thereof, are the following:

1. Section 1293, 28 U.S.C.

> "Final decisions of Puerto Rico and Hawaii Supreme Courts
>
> "The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the Supreme Courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs."

2. Section 6 of the Portal-to-Portal Act of 1947 (29 U.S.C., Section 255(a)).

> "Statute of Limitations
>
> "Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum

wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

"(a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued."

3. Section 7 of the Fair Labor Standards Act (29 U.S.C., Section 207(a)).

"Maximum hours

"(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

4. Section 18 of the Fair Labor Standards Act (29 U.S.C., Section 218).

"Relation to other laws

"No provision of sections 201-219 of this title or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under such sections or a maximum workweek lower than the maximum workweek established under such sections . . . "

5. Sections 4(b) and 5, Puerto Rico Act No. 379, approved May 15, 1948 (1948 Laws of Puerto Rico, pp. 1256, 1258, 1260).

"Section 4.—Extra hours of work are:

• • •

"(b) The hours that an employee works for his employer in excess of forty-eight hours during any week, unless the hours worked daily in excess of eight are paid double rates.

• • •

"Section 5.—Every employer who employes or permits an employee to work during extra hours shall be obliged to pay him for each extra hour a wage rate equal to double the rate agreed upon for regular hours; *Provided, however,* that every employer in any industry in Puerto Rico covered by the provisions of the Fair Labor Standards Act enacted by the Congress of the United States of America on June 25, 1938, as heretofore or hereafter amended, shall be under obligation to pay only for each hour of work in excess of the legal eight-hour working day, or in excess of forty (40) hours a week, a wage at the rate of not less than time and a half the rate of wage agreed upon regular hours, save when by a decree of the Minimum Wage Board or by a collective labor agreement, other working and/or compensation standard is heretofore or hereafter fixed. To determine the wage rate agreed upon for regular hours of work, the daily, weekly, or monthly wages, or wages otherwise stipulated, shall be divided by the number of regular hours worked during that same period in accordance with the provisions of this Act."

Statement of the Case

This case involves substantial questions relative to the Fair Labor Standards Act and to the Portal-to-Portal Act of 1947.

Respondent José A. Peña, a train dispatcher employed on a railroad system owned and operated by your petitioners, who are engaged in "interstate commerce" (29 U.S.C., Section 203 (b), (c)), brought an action against petitioners pursuant to the provisions of Puerto Rico Act No. 379 of May 15, 1948 and the Fair Labor Standards Act, on November 7, 1951, before the Superior Court of Puerto Rico, Humacao Section, claiming the amount of $2,371.16 for overtime compensation at the rate of time and a half, among other things, for work performed from May 15, 1948 to July 12, 1950 in excess of a 40-hour regular workweek. (R. on A., pp. A1-A4.) Respondent alleged that your petitioners were covered by the provisions of the Fair Labor Standards Act and that a certain Belo-type employment contract in effect between respondent and your petitioners constituted a deliberate evasion and violation of (1) the Fair Labor Standards Act, (2) Puerto Rico Act No. 289 of April 9, 1946, and (3) a certain Mandatory Decree No. 3, approved by Puerto Rico's Minimum Wage Board, pursuant to the provisions of Puerto Rico Act No. 8 of April 5, 1951, as amended. Your petitioners filed their answer to the complaint on December 10, 1951, but then omitted to raise the defense of limitations under the Portal-to-Portal Act. (R. on A., pp. A13-A15.)

On April 30, 1952 the Superior Court entered judgment for respondent from which your petitioners took an appeal to the Supreme Court of Puerto Rico, which latter Court affirmed the judgment by opinion of August 7, 1953. (R. on A., pp. A19-A35.) Your petitioners then filed a motion for reconsideration raising, among other things, the defense of

limitations under the Portal-to-Portal Act and the Court, having entertained the motion on the question of limitations, invited the Secretary of Labor of Puerto Rico and the Administrator of the Wage and Hour Division, United States Department of Labor, to appear as "amici curiae." (R. on A., pp. A43-A45.)

On December 10, 1953, the Supreme Court of Puerto Rico handed down an opinion and order denying your petitioners' motion for reconsideration in which, after making reference to the provisions of Puerto Rico Act No. 379 of 1948, which provides for the payment of time and a half for hours worked in excess of a regular workweek of 40 hours to employees covered by the Fair Labor Standards Act, and double time for hours worked in excess of a regular workweek of 48 hours to those not covered, it held that it was "unnecessary . . . to decide the question [of limitations under the Portal-to-Portal Act] . . . because we agree with the plaintiff, the Secretary of Labor of the Commonwealth of Puerto Rico, and the Secretary of Labor of the United States, that the claims involved herein are based not on the Federal Act but on local laws . . . " (R. on A., pp. A46-A51.) Your petitioners then filed a second motion for reconsideration on December 14, 1953 calling the attention of the Court to respondent's allegations invoking coverage under the Fair Labor Standards Act, and to the nature of respondent's claim, i.e., time and a half for hours worked in excess of a regular workweek of 40 hours.

The Supreme Court of Puerto Rico entertained the motion, set aside its former decision on the question of limitations, and on December 14, 1954 handed down an opinion in which, after comparing the provisions of Puerto Rico Act No. 379 of 1948 with those of the Fair Labor Standards Act and deciding that both fixed "exactly the same standards for minimum wages and maximum hours . . . " and "the same compensation," it conceded that there was a "fairly formid-

able argument" against the validity of the local statute and, therefore, against its applicability to the facts of the case in that "Congress could not have intended to permit individual states to reinstate for claims covered by the Federal Act the vexatious situation of differing state statutes of limitations which it had eliminated by § 6 of the Portal Act through the device of enacting local statutes embodying exactly the same standards of minimum wages and maximum hours of work found in the Federal Act in order to apply thereto the longer prescriptive periods provided by local law." (R. on A., pp. A62-A63.) The Court, however, reasoned that "nothing in the language or legislative history of the Portal Act . . . indicates that Congress intended to change the usual rule that statutes of limitations are generally remedial rather than substantive," and held that the Portal-to-Portal limitations were remedial and could not be raised for the first time on appeal (R. on A., pp. A65-A66), and that, in view of the result, it preferred *"to leave open the question of whether the Puerto Rican statute of limitations rather than § 6 of the Portal Act applies to wage claims for which the local and Federal Act provide exactly the same compensation"* (R. on A., p. A63), holding, therefore, by inescapable implication, that it preferred to leave open the question of the validity of the local statute.

Your petitioners then took an appeal to the United States Court of Appeals for the First Circuit from the above judgment and supplementary resolution (R. on A., p. A71), and invoked the appellate jurisdiction of the Circuit Court of Appeals for the revision of a federal question. (28 U.S.C., Section 1293.) They assigned as their only question on appeal that the Supreme Court of Puerto Rico had erred in holding that the provisions of Section 6 of the Portal-to-Portal Act were remedial rather than substantive (R. on A., p. A7). The amount in controversy being less than $5,000, your petitioners could have appealed on no other

ground. Petitioners filed their brief and argued their case before the Circuit Court on that theory. Respondent did not file a brief or argue his case. The "amicus" Secretary of Labor of the United States, basing his argument on issues not raised on appeal, insisted, in a supplemental brief on appeal, and in his argument, that respondent's case arose solely under local law.

On May 26, 1955 the Circuit Court affirmed the decision of the Supreme Court of Puerto Rico on the grounds that "we think that the Supreme Court (of Puerto Rico) rightly decided in its second opinion that the plaintiff's claims arose under the local law rather than under the Federal Fair Labor Standards Act and that it was not necessary for the Court to consider the nature of the statute of limitations contained in Section 6 of the Portal-to-Portal Act"; that although "the Legislature of Puerto Rico reduced, in the case of industries covered by the Federal Act, the length of the workweek to conform to the Federal standard of 40 hours and provided in the case of such industries for the payment of time and a half as provided in the Federal Act, instead of double time, for excess hours worked, . . . " that did not mean "as the Supreme Court in its opinion assumed, that the amount of overtime compensation provided by the local and Federal acts is identical . . . because the two acts differ as to the manner in which the employee's regular rate is computed"; that "in its first opinion the Supreme Court [of Puerto Rico] pointed out that the Puerto Rican act is more favorable to the employee than the Federal act in that it provides that the guaranteed weekly wage is to be divided by the number of 'regular hours' worked, in this case 40, instead of by the actual number of hours worked, . . . " and that the methods for the computation of the "regular rate" under the Fair Labor Standards Act "necessarily results in a lower hourly basic rate than that computed under the Puerto Rican Act, . . . "

wherefore it followed "that the plaintiff's entire claim is necessarily based upon the local law and not upon the Federal Fair Labor Standards Act . . . " (R. on A., pp. A91-A98.)

Your petitioners applied for and obtained a retention of the mandate on June 23, 1955 and filed a petition for rehearing on July 7, 1955 (R. on A., pp. A101-A106) requesting the Circuit Court to set aside its opinion on the grounds that:

1. The Circuit Court had no jurisdiction to enter into and decide the question of local law, because

(a) The Supreme Court of Puerto Rico did not make a final determination of the same.

(b) The appellate jurisdiction of the Circuit Court had been invoked solely for the revision of a federal question.

(c) The broad appellate jurisdiction of the Circuit Court to review questions of local (Puerto Rican) law, as originally defined in *Municipality of Rio Piedras* v. *Serra, Garabis & Co.*, 65 F.2d 691, was substantially restricted by the decisions of this Court, in *De Castro* v. *Board of Commissioners*, 322 U.S. 451, 88 L.Ed. 1384 and *Sancho Bonet* v. *Yabucoa Sugar Co.*, 306 U.S. 505, 83 L.Ed. 946, and by the creation of the Commonwealth of Puerto Rico.

(d) The decision of the Supreme Court of Puerto Rico, in touching upon a local act and withholding final construction of the same, was not reviewable under the rule of the *Sancho Bonet* and *De Castro* cases.

2. Puerto Rican Act No. 379 of 1948, insofar as it provides for payment of overtime at the rate of time and a half for hours worked in excess of 40 per week in industries engaged in interstate commerce and covered by the

Fair Labor Standards Act, is identical to the latter Act and *pro tanto*, actions brought to recover for such overtime are necessarily subject to the limitations of the Portal-to-Portal Act.

3. Congress did not intend to permit the States to regulate the same employer-employee relations in interstate commerce with different and varying periods of limitations throughout the nation by means of the approval of state laws for better wages and/or hours.

4. Congress did not intend to sanction discrimination against employees otherwise covered by the Fair Labor Standards Act, but whose claims found no basis under local statutes and in favor of employees also covered by the above Act, merely because they could bring a similar claim under local statutes.

5. The limitations provisions of the Portal-to-Portal Act are applicable to any cause of action for wages in interstate commerce, regardless of the statute giving rise to the same.

6. Section 5 of Act 379 of 1948 of Puerto Rico, insofar as it applies to employers also covered by the Fair Labor Standards Act, is identical to the provisions of the Fair Labor Standards Act and therefore null and void, because

(a) It transcends the legislative field reserved or granted to the States under Section 18 of the Fair Labor Standards Act.

(b) It attempts to establish a different mechanism for the computation of the regular rate of pay than that established under the Fair Labor Standards Act.

(c) The power to change the Federal formula for regular rate of pay would trench upon the provisions of the Fair Labor Standards Act and could potentially be construed and used as a general power by the States to accomplish, by legislative scheme, purposes not contemplated by Congress under Section 18 of the Fair

Labor Standards Act and to justify the same on the sole ground that it might yield a higher take-home pay.

7. The danger and inadvisability of adjudicating on appeal *a question left open* by the lower court (i.e., the Supreme Court of Puerto Rico) in this case is illustrated by its possible implications and premature impact upon other issues now pending before the Supreme and lower Courts of Puerto Rico.

Rehearing was denied by the Circuit Court of Appeals on August 3, 1955, without opinion. (R. on A., p. 107.)

Reasons for Granting the Writ

1. THE UNLIMITED APPELLATE JURISDICTION ASSERTED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT IN REVIEWING DECISIONS OF THE SUPREME COURT OF PUERTO RICO ON QUESTIONS OF LOCAL LAW OUGHT TO BE REVISED BY THIS COURT IN A MANNER CONSISTENT WITH GENERAL FEDERAL APPELLATE JURISDICTION, WITH THE DECISIONS OF THIS COURT CONCERNING PUERTO RICO'S LEGISLATIVE, STATE-LIKE, AUTONOMOUS CONDITION AND WITH PUERTO RICO'S NEWLY ACQUIRED COMMONWEALTH STATUS.

(a) *General Limitations of Appellate Jurisdiction of Circuit Court of Appeals*

The appeal below solely raised a federal question. (28 U.S.C. 1293.) The only question brought up on appeal, briefed, argued and submitted to the Circuit Court was that concerning the nature of the limitations of Section 6 of the Portal-to-Portal Act. The scope of the appeal, therefore, was necessarily limited to that issue. *U. S.* v. *Crescent Amusement Co.*, 323 U.S. 173, 89 L.Ed. 160, 167, Reh.Den.

323 U.S. 818, 89 L.Ed. 650. The Circuit Court, however, declined to decide the question on the ground that respondent's cause of action arose under local law No. 379 of 1948 and was, therefore, not subject to the limitations of the Portal-to-Portal Act. In arriving at that result, the Circuit Court (1) construed the local law in a manner different and opposite to the Supreme Court of Puerto Rico and concluded that the provisions of the local act for the payment of time and a half over a regular workweek of forty hours and for the computation of regular rate of pay by dividing total pay by a week of forty hours—yielded a "more favorable" result than the Fair Labor Standards Act, and (2) therefore assumed the validity of the local law. The first question was decided by the Supreme Court contrary to the decision of the Circuit Court and the same was not raised on appeal. The second was left open by the Supreme Court of Puerto Rico. The Circuit Court, under well established general principles of appellate jurisdiction, should have been precluded from going into and/or deciding the same (*Walters* v. *St. Louis*, 347 U.S. 231, 98 L.Ed. 660, 664; *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 89 L.Ed. 2092, 2097; *Grayson* v. *Harris*, 267 U.S. 352, 69 L.Ed. 652, 656; *Helvering* v. *Hormel*, 111 F.2d 1, 5, aff'd *Hormel* v. *Helvering*, 312 U.S. 552, 85 L.Ed. 1037; *Publicity Building Realty Corporation* v. *Hannegan*, 139 F.2d 583, 587; *Consolidated Royalties* v. *Ashton*, 132 F.2d 226, 229), the decision of the Supreme Court of Puerto Rico not constituting a deliberate evasion of a federal question by a decision on a local law ground (*Radio Station WOW, Inc.* v. *Johnson*, supra, L.Ed. p. 2100; *Nickel* v. *Cole*, 256 U.S. 222, 65 L.Ed. 900, 905; *Nevada-California-Oregon R. Co.* v. *Burrus*, 244 U.S. 103, 61 L.Ed. 1019, 1022; *Atlantic C.L.R. Co.* v. *Mims*, 242 U.S. 532, 61 L.Ed. 476, 478); nor being the decision of the questions imperative to dispose of the federal question brought up on appeal. *Public Utilities Com.* v.

United Fuel Gas Co., 317 U.S. 456, 87 L.Ed. 396, 400; *Sterling* v. *Constantin*, 287 U.S. 378, 77 L.Ed. 375, 383.

(b) *Scope of Asserted Appellate Jurisdiction of the Court of Appeals for the First Circuit on Questions of Local Laws of Puerto Rico*

The Circuit Court of Appeals for the First Circuit, however, has consistently reiterated that its appellate jurisdiction is not subject to the limitations under (a) above, on appeals from decisions of the Supreme Court of Puerto Rico holding that in such cases, regardless of amount in controversy or the appellate ground invoked, it can examine the whole record and decide questions of Puerto Rican local laws. *Mercado Riera* v. *Mercado Riera*, 152 F.2d 86, 92; *Gelpi* v. *Tugwell*, 123 F.2d 377, 382; *Municipality of Rio Piedras* v. *Serra, Garabis & Co.*, 65 F.2d 691, 700-702.

The *Serra* case, decided in the year 1933, in construing 28 U.S.C. 1293, broadly asserted this unlimited and peculiar appellate jurisdiction stating that Congress "in conferring jurisdiction [on the Court of Appeals for the First Circuit] to review the final decisions of the Supreme Court of Puerto Rico, placed no such limitation upon its scope of review . . . and left it unrestricted," and that "it cannot reasonably be contended that the People of Puerto Rico stand like a State and that questions of local law decided by the Supreme Court of Puerto Rico are not subject to review here . . . The people of Puerto Rico and its courts are the creatures of Congress—not so a State court and its agencies." *Municipality of Rio Piedras* v. *Serra, Garabis & Co.*, supra, pp. 700-701. Later decisions of the Circuit Court of Appeals have reaffirmed this principle.

28 U.S.C. 1293, though not in specific language denying such broad assumption of appellate jurisdiction, does not warrant or require that the Court of Appeals, *motu proprio*,

enter into questions of local laws not raised on appeal and not adjudicated by the Supreme Court of Puerto Rico. The power to review judgments of the Supreme Court of Puerto Rico on questions of local law does not call for its exercise without regard to the issues brought up on appeal and to the usual rules of appellate practice. Following the principles controlling the appellate jurisdiction of other Courts of Appeals will not detract from such power. Examining the whole record on appeal without heed to the errors assigned, adds nothing to such power of review and only brings confusion and uncertainty into appeals to the First Circuit, where a party is never sure of the grounds upon which his case will be decided, and is constantly subjected to the risk of having his appeal disposed of on grounds not assigned on appeal and, therefore, not adequately briefed or properly discussed.

(c) *Limitation of the Serra Doctrine by Subsequent Decisions of this Court*

Assuming, *arguendo*, that the *Serra* case constituted a correct exposition of the appellate jurisdiction of the Circuit Court of Appeals for the First Circuit in cases coming from Puerto Rico, its scope has been effectively limited by subsequent decisions of this Court. The *Serra* case was decided in the year 1933. *Puerto Rico* v. *Shell Co.*, 302 U.S., 253, 82 L.Ed. 235, decided by this Court in the year 1938, held that the Congress, in enacting the Foraker Act (39 Stat. at L. 951), intended "to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the States and incorporated territories"; that "the effect was to confer upon the territory many of the attributes of quasi-sovereignty possessed by the States" and that "so far as local matters are concerned . . . legislative powers were conferred nearly, if not quite, as extensive as

those exercised by the state legislatures." *Puerto Rico* v. *Shell*, supra, L.Ed. pp. 242-243. To the same effect see *People of Puerto Rico* v. *Rubert Hermanos*, 309 U.S. 543, 84 L.Ed. 916. Thus, the very foundation of the *Serra* doctrine, Puerto Rico's subservience, was seriously questioned, for if Puerto Rico enjoys a position similar to that of a State for legislative purposes, there is no legitimate or practical justification for the *Serra* doctrine.

Furthermore, the political mutation of Puerto Rico from a non-incorporated, organized territory into a Commonwealth would also seem to detract from the necessity of such broad revisionary power.

(d) *Limitation of the Serra Doctrine by the "Patently Erroneous" or "Inescapably Wrong" Requirement*

This Court has further restricted the appellate jurisdiction of the Circuit Court of Appeals for the First Circuit in dealing with decisions of the Supreme Court of Puerto Rico bearing on questions of local laws. *Bonet* v. *Yabucoa Sugar Co.* (1939), 306 U.S. 505, 83 L.Ed. 946, 949, and *De Castro* v. *Board of Commissioners*, (1944), 322 U.S. 451, 88 L.Ed. 1384, 1392, while not restricting the occasions for the exercise of the revisionary power of the Court of Appeals for the First Circuit, have laid down the rule that judgments of the Supreme Court of Puerto Rico on questions of local law must be deferred to unless inescapably wrong or patently erroneous, thus practically assimilating revision of judgments of the Supreme Court of Puerto Rico to that of State judgments bearing on State laws. *De Castro* v. *Board of Commissioners*, supra, L.Ed. p. 1393.

Petitioners submit that after *De Castro*, the rule of *Serra* was inapplicable to appeals from Puerto Rican judgments on questions of local laws. The broad rule in *Serra* is incompatible with the restrictions in *De Castro*. Thus, under

Serra and *De Castro*, the Circuit Court could at any time examine the whole record on appeal, if only to affirm on questions of local law, a power which has not, up to the present, yielded, as far as petitioners know, a single reversal.

(e) *The Circuit Court of Appeals for the First Circuit Circumvented the De Castro Rule and the Provisions of* 28 *U.S.C.* 1293

The Circuit Court entered into, laid down the construction and upheld the validity of Section 5 of Puerto Rico Act No. 379 of 1948 in a manner inconsistent with the decision of the Supreme Court of Puerto Rico, in leaving the questions open for future decision. With no "final decision" of the Supreme Court of Puerto Rico on the question of the validity of the local act (*Ocean Park Development Corp.* v. *People of Puerto Rico*, 204 F.2d 371, 373), and with no showing of patently or manifestly erroneous in the reasoning of the Supreme Court of Puerto Rico, the Circuit Court undertook to decide, contrary to the said Supreme Court, that the local act was different from the Fair Labor Standards Act and, therefore, by implication, that the same was valid. Thus, by deciding in advance a question of local law left open for decision, the Circuit Court sought to avoid the inescapably wrong *sine qua non* of revision of Puerto Rican final decisions on questions of local law and the provisions of 28 U.S.C. 1293, granting review only of "final decisions" of the Supreme Court of Puerto Rico.

(f) *This Court Can Decide the Questions Left Undecided by the Circuit Court of Appeals*

The issues are clear on the record and nothing would be gained, if this Court shall reverse the Circuit Court, by

sending the case down for further proceedings. In all likelihood, the case will again be brought to this Court for final determination. Furthermore, the questions posed are of such importance that they warrant a decision by this Court in order to settle them at the first available opportunity. *Kiefer-Stewart* v. *Seagram*, 340 U.S. 211, 95 L.Ed. 219, 224; *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448, 87 L.Ed. 892, 940; *Story Parchment Co.* v. *Paterson P. Paper Co.*, 282 U.S. 555, 75 L.Ed. 544, 551.

2. The Statute of Limitation Provision of Section 6 of the Portal-to-Portal Act is Substantive in Nature

Both the intent of the Congress in framing the Portal-to-Portal Act and the language in which the Act is couched, warrant the conclusion that the same was designed as a means to terminate and extinguish the causes of action for wages in interstate commerce not exercised within the time allotted by it.

Congress intended to establish a uniform statute of limitations in order to relieve interstate commerce of the difficulties arising from the potential retroactive liability which might have been imposed upon employers under the different State statutes of limitations. (House Report No. 71, February 25, 1947, U.S. Code Congressional Service, 80th Congress, First Session, pp. 1029, 1036; Portal-to-Portal Act, Congressional Findings and Declaration of Policy, 29 U.S.C., Section 251.) The intent of Congress could be made futile and academic if the statute approved were remedial in nature and, therefore, subject to the various and different State statutes bearing upon the manner in which statutes of limitations may be tolled.

Furthermore, State courts, if the statute be held remedial in nature, will not be bound to apply its provisions and will

apply the law of the forum in deciding claims under the Fair Labor Standards Act, thus thwarting the Congressional Policy of uniformity and limited retroactive liability in wage claims in the interstate commerce field. *Bindczyck* v. *Finucane*, 342 U.S. 76, 96 L.Ed. 100, 110; *Angel* v. *Davenport*, 271 U.S. 33, 70 L.Ed. 813, 817-818; *Arnson* v. *Murphy*, 109 U.S. 238, 27 L.Ed. 920, 922; Developments in the Law—Statute of Limitations, 63 Harv. L. Rev. 1177, 1186-7.

The rights emanating from the Fair Labor Standards Act are creative rights, unknown to the common law. *Rogers Cartage Co.* v. *Reynolds*, 166 F.2d 317, 320-321; *Local 626, etc.* v. *General Motors Corporation*, 76 F.Supp. 593, 594; *Role* v. *J. Neils Lumber Co.*, 74 F.Supp. 812, 814, aff'd 171 F.2d 706. Statutes limiting the time within which such rights may be exercised are construed as substantive limits on the right or as a condition precedent to their exercise. *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 356, 88 L.Ed. 96, 100; *A. J. Phillips Co.* v. *Grand Trunk W. R. Co.*, 236 U.S. 662, 59 L.Ed. 774, 776. The limitations of the Portal-to-Portal Act, furthermore, form part of the Fair Labor Standards Act (*Jackson* v. *Northwestern Airlines*, 76 F.Supp. 121, 125, reversed on other grounds, 185 F.2d 74, cert. den. 342 U.S. 812, 96 L.Ed. 614) and must be taken as an integral part of the same in the statute and not form part of the general law of limitations.

Finally, the language in which the limitations are couched point to the conclusion that the statute is substantive in nature. Section 6(a) of the Portal-to-Portal Act refers to "causes of action" and expressly provides that "every such action"—obviously meaning the "causes of action"—not brought within the stated time "shall be forever barred." This language is not usual in remedial limitations and its positive declaration, in keeping with the intent of the Congress in framing the same and the historical medium in which it was adopted, lead to no other result than that the

limitation is substantive. (*William Danzer & Co.* v. *Gulf & I.R. Co.*, 268 U.S. 633, 69 L.Ed. 1126, 1129; *A. J. Phillips Co.* v. *Grand Trunk W.R. Co.*, supra; *Finn* v. *United States*, 123 U.S. 227, 31 L.Ed. 128, 130; *Sgambati* v. *U. S.*, 172 F.2d 297, 298; *Joint Council, etc.* v. *Delaware, L. & W. R. Co.*, 157 F.2d 417, 420; *Pennsylvania Co. for Insurances, etc.* v. *Deckert*, 123 F.2d 979, 984-985; *John F. Jelke Co.* v. *Smietanka*, 86 F.2d 470, 471, 473; *De Bonis* v. *U. S.*, 103 F.Supp. 123, 126; *Paschal* v. *North Atlantic & Gulf S.S. Co.*, 95 F. Supp. 293, 295; *Adams* v. *Albany*, 80 F.Supp. 876, 880-882; *Berry* v. *Heller*, 79 F.Supp. 476, 477; *O'Neill* v. *Cunard White Star Ltd.*, 69 F.Supp. 943, 945; *Awad* v. *Durant*, 69 F.Supp. 921; *U. S.* v. *MacEvoy*, 110 F.R.D. 323, 325.

3. The Provisions of Section 18 of the Fair Labor Standards Act (29 U.S.C. 218) do not Constitute a "Carte Blanche" to the States and to Puerto Rico to Enact All Sorts of Local Legislation that Would Override the Provisions of the Fair Labor Standards Act and of the Portal-to-Portal Act

Section 18 of the Fair Labor Standards Act recognizes State action in two clearly defined fields, a lower maximum workweek and a higher minimum salary. By the same token, the other particulars of the employer-employee relation in interstate commerce are excluded from State action (*Weber* v. *Anheuser-Busch*, U.S. , 99 L.Ed. (Advance pp. 368, 394)), especially in view of the Congressional intent to establish uniform legislation on a national level. *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 87 L.Ed. 460, 465-466. The States were not, therefore, allowed by Section 18 to approve legislation identical to the provisions of the Fair Labor Standards Act or, as pointed by the Circuit Court, "to conform to the Federal Standards of 40 hours." Moreover, such legislation would not only be outside the

scope of that permitted by Section 18, but would also coincide with the provisions of the Federal Act and would therefore be null and void. *Bethlehem Steel Corp.* v. *New York Labor Rel. Bd.*, 330 U.S. 767, 91 L.Ed. 1234, 1247; *Missouri P. R. Co.* v. *Porter*, 273 U.S. 341, 71 L.Ed. 672, 675; *Charleston & W. C. R. Co.* v. *Varnville Furniture Co.*, 237 U.S. 597, 59 L.Ed. 1137, 1140. The provisions of Section 5 of Puerto Rico Act No. 379 of 1948 insofar as they coincide with the federal wage and hour standards are, therefore, invalid.

The Circuit Court found, however, that such provisions, when taken together with those other of the said Section 5 establishing a different mechanism to arrive at "regular rate of pay" made the local act "different" from the Federal Act, in that it yielded a "more favorable" result to the employee and therefore presumably established a higher wage. But this mathematical result does not warrant the conclusion reached by the Court, nor does it sustain the validity of Section 5. The States were not left free to adopt any kind of legislation, and by devious means to override the provisions of the Fair Labor Standards Act, provided it yielded a better take home pay to the employee. If such were the case, the States would be free to "establish a higher minimum wage" by trenching upon the exemptions granted by the Federal Act, or as in this case, altering the method for the computation of the regular rate of pay, which also forms part of the Federal Act. *Bayridge Operating Co.* v. *Aaron*, 334 U.S. 446, 92 L.Ed. 1502, 1517; *Walling* v. *Halliburton Oil Well Cement Co.*, 331 U.S. 17, 91 L.Ed. 1312, 1318.

Furthermore, an interpretation of Section 18 of the Fair Labor Standards Act, as would allow the States to leave without effect the exemptions of the Federal Act and to change its mechanism for the computation of regular rate of pay, would leave the applicability of those provisions to the discretion of the States and would lead to differentiations in

interstate commerce not contemplated by the Act (29 U.S.C., Section 208(6)). (*Walling* v. *Jacksonville Paper Co.*, supra, L.Ed. pp. 465-466; *Jerome* v. *United States*, 318 U.S. 101, 87 L.Ed. 640, 643; *United States* v. *Pelzer*, 312 U.S. 399, 85 L.Ed. 913, 915; *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 64 L.Ed. 834, 840-841.)

4. The Statute of Limitations Provision of Section 6 of the Portal-to-Portal Act Applies to All Claims for Wages in Interstate Commerce Regardless of Their Origin Under Local Laws

The evil sought to be remedied by the Portal-to-Portal Act was of a national character (*Northwestern-Hanna Fuel Co.* v. *McComb*, 166 F.2d 932, 939; *W. U. Tel. Co.* v. *McComb*, 165 F.2d 65, 73), and it is to be presumed that the remedy adopted was in the same order. (*United States* v. *American Trucking Association*, 310 U.S. 534, 84 L.Ed. 1345, 1350-1351.) The Portal-to-Portal Act—if it is to be effectively operative in interstate commerce—must govern and limit all causes of action for wages in the said commerce. To hold otherwise would lead to the conclusion that even after the enactment of 1947 the States were left free, under the provisions of Section 18 of the Fair Labor Standards Act, or otherwise, to adopt legislation that would render the Act academic and which would stand as an obstacle to the accomplishment of the objectives of Congress. This result is more necessary if the States, in enacting legislation within the scope of the limits of Section 18 of the Fair Labor Standards Act, raise the minimum wages and/or lower the maximum workweek of the Federal Act, with the result, if the employer-employee relation be then controlled by the State statute of limitations, of reproducing, perhaps in worse form, the conditions which prompted Congress to enact the Portal-to-Portal Act. *Weber* v. *Anheuser-Busch*,

supra, L.Ed. p. 386; *Amalgamated Ass'n* v. *Wisconsin Emp. Rel. Bd.*, 340 U.S. 383, 95 L.Ed. 364, 375; *Hill* v. *Florida*, 325 U.S. 538, 89 L.Ed. 1782, 1784-1785; *Hines* v. *Davidowitz*, 312 U.S. 52, 85 L.Ed. 581, 587.

Conclusion

For the above stated reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

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APPENDIX

Opinion Below

OPINION OF THE COURT.

May 25, 1955.

MARIS, *Circuit Judge.* This is a suit by the plaintiff, Jose A. Pena, against his employers, the defendants Eastern Sugar Associates, a trust, for unpaid overtime compensation which he alleges is due him under the provisions of Act No. 379, Laws of Puerto Rico, 1948. The suit was brought in the former insular district court. The defense was that the parties had entered into an employment contract of the so-called Belo type[1] which precluded the claim. The district court overruled the defense and entered judgment for the plaintiff. From this judgment both parties appealed to the Supreme Court of Puerto Rico. That court, upon the appeal of the defendant, upheld the conclusion of the district court that the contract between the parties was not a Belo type contract and that the plaintiff was therefore entitled to recover overtime compensation. Upon the appeal of the plaintiff the Supreme Court modified the judgment so as to award the plaintiff overtime compensation computed on the basis of a regular workweek of 40 hours instead of 48 hours, the figure used by the district court. P.R.R. .

The defendants asked the Supreme Court to reconsider its decision on the ground, then asserted for the first time, that the statute of limitations contained in section 6 of the Federal Portal-to-Portal Act of 1947[2] barred the portion of the claim in suit which arose prior to November 7, 1949, two years before the suit was begun. The Supreme Court

[1] See *Walling* v. *Belo Corp.*, 1942, 316 U.S. 624.

[2] 29 U.S.C.A. § 255.

denied the motion in an opinion holding that the plaintiff's claim arose exclusively under the local law of Puerto Rico and not under the Federal Fair Labor Standards Act and that the statute of limitations contained in section 6 of the Portal-to-Portal Act did not apply to suits brought to enforce claims to overtime compensation arising under local law. P.R.R. .

Upon a second motion by the defendants, however, the Supreme Court gave further consideration to the defendants' contentions, filing a third opinion in which it considered the question whether the suit was not in fact for overtime wages due under the Federal Fair Labor Standards Act and whether in such a suit the issue of the bar of the statute of limitations or prescription under section 6 of the Portal-to-Portal Act could be raised for the first time on appeal. Concluding that section 6 was a procedural statute which barred the remedy but did not extinguish the right the court held that since this defense had not been raised at the trial it had been waived and could not be raised on appeal. Stating that in view of this conclusion it preferred to leave open the question whether the Puerto Rican statute of limitations rather than section 6 of the Portal-to-Portal Act applied to wage claims for which both the Federal and the local law provide exactly the same standards, the Supreme Court again denied reconsideration. P.R.R. . The present appeal by the defendants followed.

We think that the Supreme Court rightly decided in its second opinion that the plaintiff's claims arose under the local law rather than under the Federal Fair Labor Standards Act and that it was not necessary for the court to consider the nature of the statute of limitations contained in section 6 or the Portal-to-Portal Act.

Section 18 of the Fair Labor Standards Act provides that no provision of that act "shall excuse non-compliance

with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act".[3] Thus the States, and this undoubtedly includes the Commonwealth of Puerto Rico, are given freedom of action to establish higher standards than those established by the Federal act. Puerto Rico has done so by Act No. 379, Laws of Puerto Rico, 1948, under which this suit was brought. The pertinent portions of that act follow:

> "Section 2. Eight hours of work constitute the legal working day in Puerto Rico.
>
> Forty-eight hours of work constitute a working week.
>
> Two hundred and eight hours of work constitute a working month.
>
> Section 3. Regular hours of work are eight hours during any period of twenty-four consecutive hours, forty-eight hours during any week, and two hundred and eight hours during any month; . . .
>
> Section 4. Extra hours of work are:
>
> (*a*) The hours that an employee works for his employer in excess of eight hours during any period of twenty-four consecutive hours;
>
> (*b*) The hours that an employee works for his employer in excess of forty-eight hours during any week, unless the hours worked daily in excess of eight are paid at double rates;
>
> . . .
>
> (*e*) The hours that an employee works for his employer during the day of rest heretofore or hereafter fixed by law in the case of businesses and industries not subject to the closing of their establishments;
>
> . . .

[3] 29 U.S.C.A. § 218.

Section 5. Every employer who employs or permits an employee to work during extra hours shall be obliged to pay him for each extra hour a wage rate equal to double the rate agreed upon for regular hours; *Provided, however,* That every employer in any industry in Puerto Rico covered by the provisions of the Fair Labor Standards Act enacted by the Congress of the United States of America on June 25, 1938, as heretofore or hereafter amended, shall be under obligation to pay only for each hour of work in excess of the legal eight-hour working day, or in excess of forty (40) hours a week, a wage at the rate of not less than time and a half the rate of wage agreed upon for regular hours, save when by a decree of the Minimum Wage Board or by a collective labor agreement, other working and/or compensation standard is heretofore or hereafter fixed. To determine the wage rate agreed upon for regular hours of work, the daily, weekly, or monthly wages, or wages otherwise stipulated, shall be divided by the number of regular hours worked during that same period in accordance with the provisions of this Act.

. . .

Section 7. If an employee works for a weekly wage, the wage stipulated shall cover solely the payment of the regular working hours during each week.

. . .

Section 13. Any employee who receives a compensation less than that fixed by this Act for regular hours and extra hours of work shall be entitled to recover from his employer, through civil action, the sums unpaid, plus an equal sum as liquidation of damages, in addition to the costs, expenses, and attorney's fees of the proceeding."

It will thus be seen that the local law authorizes suits by employees for the recovery of unpaid overtime compensation plus an equal sum of liquidated damages. It is quite clear from the record that the present suit was brought under the authority of this act. The plaintiff was paid under his employment contract a guaranteed weekly wage of $34.00. The contract also specified hourly rates. But since the Supreme Court held that these rates were fictitious and arbitrary and its ruling in this regard is not here appealed from we need not consider them. The plaintiff's claim is for overtime pay predicated upon daily work after 8 hours, work on days of rest, and in some weeks work for more than 40 hours but not more than 8 hours on any one day or at all on a day of rest.

With respect to the first two bases for the plaintiff's claim, that is, daily work after 8 hours and work on days of rest, he claims time and a half and double time, respectively, under section 5 of Act No. 379. Since there is no similar provision in the Federal law it is perfectly clear that this part of his claim is solely under the local law. With respect to the portion of the plaintiff's claim based on work for more than 40 hours in one week but not more than 8 hours in any one day or at all on a day of rest the matter is more complicated. For this claim is based on the proviso in section 5 of Act No. 379 "That every employer in any industry in Puerto Rico covered by the provisions of the Fair Labor Standards Act . . . shall be under obligation to pay only for each hour of work . . . in excess of forty (40) hours a week, a wage at the rate of not less than time and a half the rate of wage agreed upon for regular hours . . . " Thus the Legislature of Puerto Rico reduced, in the case of industries covered by the Federal act, the length of the workweek to conform to the Federal standard of 40 hours and provided in the case of such industries for the payment of time and a half as provided by the Federal

act, instead of double time, for excess hours worked.[4] But this does not mean, as the Supreme Court in its third opinion assumed, that the amount of overtime compensation provided by the local and Federal act is identical in the case of one who works more than 40 hours a week but not more than 8 hours in any one day or at all on a day of rest.

This is because the two acts differ as to the manner in which the employee's regular rate is computed for overtime purposes. In its first opinion the Supreme Court pointed out that the Puerto Rican act is more favorable to the employee than the Federal act in that it provides that the guaranteed weekly wage is to be divided by the number of "regular hours" worked, in this case 40, instead of by the actual number of hours worked, in determining the "rate agreed upon for regular hours" which is the basis for computing time and a half for extra hours worked. We agree with the Supreme Court that this conclusion is compelled by the last sentence of section 5 and by section 7 of Act No. 379. Under the Federal Fair Labor Standards Act, however, the "regular rate at which he is employed" which is the basis for the overtime compensation of an employee who works more than 40 hours in a week is to be found by dividing the weekly compensation by the total number of hours actually worked in that week.[5] This necessarily results in a lower hourly basic rate than that computed under the Puerto Rican act. Accordingly in every case in

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[4] Section 7(a) of the Federal Fair Labor Standards Act, as amended, provides as follows:

> "(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C.A. § 207(a).

[5] *Overnight Motor Co.* v. *Missel*, 1942, 316 U.S. 572; *Bay Ridge Co.* v. *Aaron*, 1948, 334 U.S. 446.

which the plaintiff worked for more than 40 hours for his weekly wage of $34.00 the overtime compensation to which he was entitled under the Puerto Rican act was greater than that provided for by the Federal act, regardless of whether or not he worked on a rest day or for more than 8 hours on any other day.

It follows that the plaintiff's entire claim is necessarily based upon the local law and not upon the Federal Fair Labor Standards Act. The statute of limitations imposed by section 6 of the Portal-to-Portal Act by its terms, however, applies only to suits to enforce causes of action "under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act". It does not purport to apply to similar causes of action arising under state law[6] and was not intended to do so, as the legislative history clearly shows.[7] It is, therefore, unnecessary for us to determine whether section 6 of the Portal-to-Portal Act is substantive or procedural or to consider what its effect might be under other circumstances than those at bar.

The judgment of the Supreme Court will be affirmed.

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[6] Whether it could constitutionally be applied to bar suits for the enforcement of purely state causes of action we need not consider.

[7] "The limitation herein provided applies only to the statutory actions or proceedings set forth in the acts enumerated in Section 5 of H.R. 2157 [which became the Portal-to-Portal Act]. Actions under the common law, or under State statutes for recovery of wages are not affected." H. Rept. No. 71, 80th Cong., 1st Sess., p. 7.